It will be seen from these statutes that the courts of equity have made a marked departure from the fundamental idea that their jurisdiction is exclusively *in personam* when attempting to enforce obedience to their decrees. The statutes are the result of the feeling which has been persistently growing, that equity itself should have some method of enforcing and carrying out a decree which an obstinate defendant has refused to perform. This tendency is further illustrated by the new Equity Rule eight of the Supreme Court of the United States, the latter part of which provides that: "If a mandatory order, injunction, or decree for the specific performance of any act or contract be not complied with, the court or a judge, besides or instead of, proceeding against the disobedient party for a contempt or by sequestration, may by order direct that the act required be done, so far as practicable by some other person appointed by the court, at the cost of the disobedient party, and the act, when so done, shall have like effect as if done by him."[15] Turning for a moment to the Pennsylvania decision [16] before cited, it is obvious that the case would have been far more effectively disposed of had the court directed the building to be removed by some appointee of their own, in accordance with this rule, instead of allowing their hands to be tried by the dogged contumacy of a defendant who preferred jail to obedience to the decree. No legislation is necessary to enable courts of equity to exercise this power of acting through third parties at the cost of the disobedient defendant, since it is a power inherent in all courts. It is hoped that the definite recognition by our highest court of the existence of such a power will not only have a salutary effect upon the courts in blazing a way for future judicial development, but may also result in a statutory enactment expressly granting this power to courts of equity and thereby satisfying even the most conservative tribunals.

*P. H. R.*

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PROPERTY—DAMAGES FOR "SPITE" WALL—The right to the full and complete enjoyment of an absolute dominion over one's own property has for ages been most jealously guarded by our legal system, and any attempt to encroach by legal means upon this right has been met with instant and determined opposition. That when a man owns property he owns to the heavens above and to the centre of the earth below, and that within this rather definite region he may do what he pleases so long as he does not violate the public law or commit a nuisance, is insisted on as one of the essential attributes of this absolute dominion. It is, therefore, interesting to note the

[15] The English Rules of the Supreme Court, Order XLII, Sec. 30, provides practically the same thing.

[16] *Supra,* note 6.

apparent change in legal sentiment with regard to this right, as shown by the various statutes and many of the late cases dealing with so-called "spite" fences. Although generally having their inception in trifling quarrels or petty hatreds, these cases bring out the issue squarely, whether this absolute dominion is to exist for all purposes, regardless of who may be injured by its exercise.

The recent case of *Hibbard* v. *Haliday*[1] is an excellent illustration of the view taken by a number of late cases and enacted into law by many State statutes. The plaintiff had erected an apartment building close to the dividing line between his property and the defendant's lots, with a dozen windows overlooking the lots owned by the defendant. The declaration stated that the defendant thereupon erected and had since maintained a high brick wall along the boundary line, extending along the whole length of the plaintiff's building and to within a few feet of its roof in height, and for no other purpose than maliciously to injure the plaintiff in the enjoyment and use of his property. On demurrer the declaration was held to state a cause of action, which ruling was affirmed by the Supreme Court.

It is conceded that in all cases where the structure complained of serves some useful or ornamental purpose, even though malice may have been the predominating motive for its existence, the owner of the property on which it rests is strictly within his rights in erecting it, and whatever harm results to the other party is *damnum absque injuria.* Wherever an easement of light and air exists or the doctrine of ancient windows prevails, if a spite fence interferes there is no doubt as to the remedy. But in America, generally these doctrines do not exist.

Before the opinion of Mr. Justice Morse, of the Michigan Supreme Court, in the case of *Burke* v. *Smith*,[2] the majority of courts and the undoubted weight of authority favored the application of the maxim *cujus est solum ejus est usque as coelum* to its fullest extent. They permitted the erection of spite fences, while deploring the necessity to do so, on the ground that it would be an unwarranted interference with a person's right to the full enjoyment of his own property, and insisted that the remedy, if any, should be through legislation.[3] But Mr. Justice Morse took the position that

[1] 158 Pac. 1158 (Okla. 1916).

[2] 69 Mich. 380 (1888).

[3] Pickard v. Collins, 23 Barb. 458 (N. Y. 1856); Levy v. Brothers, 4 Misc. 48 (N. Y. 1893); Mahan v. Brown, 13 Wend. 261 (N. Y. 1835), a leading case; Lapere v. Luckey, 23 Kan. 534 (1880); Guest v. Reynolds, 68 Ill. 478 (1873); Ransom v. McAlister, 9 Ky. L. Rep. 495 (1887); Letts v. Kessler, 54 Ohio St. 73 (1896); Giller v. West, 162 Ind. 17 (1904); Bordeaux v. Green, 22 Mont. 254 (1899); Metzger v. Hochrein, 107 Wis. 267 (1900), criticising the Michigan cases severely as a judicial trespass on the legislative authority.

no man should have the right maliciously to injure his neighbor under the guise of exercising a legal right, when his sole purpose in exercising that right is to injure his neighbor and in no way to benefit himself or others.[4] His opinion was given in a divided court and did not become the law of Michigan until some time later, when it was several times unanimously affirmed.[5] The opinion has been quoted at length in almost every case following the view expressed therein, and has probably determined the noticeable drift in opinion in such cases, toward a broader interpretation of the maxim *sic utere tuo, ut alienum non laedas.*[6]

A number of States have enacted statutes forbidding the erection of "spite" fences where the sole motive for erection is to spite or injure the adjoining property owner and where the fence does not benefit the builder either by way of protection, use or ornament.[7] The remedy under these statutes is generally by injunction, and in proper cases penalties or damages are allowed. It is necessary that malevolence be the predominating motive for its erection;[8] and that the fence or wall be on the boundary line itself or very close to it.[9]

It is submitted that the position adopted by the principal case and those like it, is the better view and does not involve any great deprivation of legal rights, such as is feared by the ultra-conservative legalists.

*T. L. H.*

[4] "But it must be remembered that no man has a legal right to make a malicious use of his property, not for any benefit to himself, but for the avowed purpose of damaging his neighbor. To hold otherwise would make the law a convenient engine, in cases like the present, to injure and destroy the peace and comfort, and to damage the property, of one's neighbor, for no other than a wicked purpose, which in itself is—or ought to be—unlawful. The right to do this cannot, in an enlightened country, exist either in the use of property or in any way or manner." Mr. Justice Morse, in Burke v. Smith, note 2, *supra.*

[5] Flaherty v. Moran, 81 Mich. 52 (1890); Kirkwood v. Finegan, 95 Mich. 543 (1893); Peek v. Roe, 110 Mich. 52 (1896).

[6] Rideout v. Knox, 148 Mass. 368 (1889); Barger v. Barringer, 151 N. C. 433 (1909); Norton v. Randolph, 176 Ala. 381 (1912); Bush v. Mocket, 95 Neb. 552 (1914); Metz v. Tierney, 13 N. M. 363 (1906); and the Michigan cases in note 5, *supra.*

[7] California, Stat. 1885, p. 45; Connecticut, Rev. St. 1902, Secs. 1013, 1107; Maine, Rev. St., Chap. 22, Sec. 6; Massachusetts, Rev. Laws, 1902, Chap. 33, Sec. 19; New Hampshire, Pub. Stat., Chap. 143, Secs. 28, 29, 30; Vermont, Pub. Stat., 1906, Tit. 22, Chap. 179, Sec. 4150; Washington, Rem. & Bal. Code, Sec. 720, 2 H. C. Sec. 268.

[8] Whitlock v. Uhle, 75 Conn. 423 (1903); Healey v. Spaulding, 104 Me. 122 (1908); Rideout v. Knox, 148 Mass. 368 (1889); Karasek v. Peier, 22 Wash. 419 (1900).

[9] Ingwersen v. Barry, 118 Cal. 342 (1897); Brostrom v. Lauppe, 179 Mass. 315 (1901).